No. 17-988

In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS[1]

The brief in opposition offers no persuasive defense of the decision below. As the petition explains, the Ninth Circuit panel's identification of an agreement to authorize class arbitration based on language found in virtually any standard arbitration clause amounts to a "palpable evasion of *Stolt-Nielsen S.A.* v. *Animal Feeds Int'l Corp.*, 559 U.S. 662, 684-85 (2008)." Pet. App. 5a (Fernandez, J., dissenting); see also Pet. 9-19; Chamber of Commerce Br. 4-10.

That error is so clear as to warrant summary reversal. Pet. 27; Chamber of Commerce Br. 10-12. And by departing from this Court's clear guidance, the decision below creates a circuit conflict that independently warrants review to secure uniform application of the FAA. Pet. 19-22.

Desperate to avoid scrutiny by this Court of the Ninth Circuit's "palpable evasion" of the FAA, Varela uses the smokescreen approach—advancing a potpourri of purported obstacles to review. Each is unpersuasive.

First, Varela contends that the Ninth Circuit lacked jurisdiction. That argument contradicts this Court's holding that a district court's dismissal of the underlying claims in favor of arbitration is a "'final decision with respect to an arbitration'" subject to "immediate appeal" under Section 16(a)(3) of the FAA. *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 86-87 (2000) (quoting 9 U.S.C. § 16(a)(3)).

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[1] The Petition's Rule 29.6 Statement remains accurate.

Next, Varela insists that the decision below reflects generally applicable state contract-law principles. But this Court rejected similar arguments in *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421 (2017), and *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015). Here too, this Court's intervention is needed to address lower court defiance of the FAA under the guise of state contract law.

Finally, Varela's grab-bag of other purported barriers to review fares no better. For example, Varela's speculation that the question presented is of "rapidly diminishing importance" (Opp. 27) as parties expressly prohibit class arbitration in their agreements ignores the numerous recent cases involving the question presented here (Pet. 19-23 & n.8).

The conflict between the decision below and this Court's FAA precedents (as well as decisions of other circuits) is clear, and Varela has not identified any sound reason why this Court should decline review.

I. The Court Below Had Jurisdiction.

Varela is simply wrong in asserting that there is a "problematic jurisdictional issue" here. Opp. 20-24. He argues for the first time that the district court's order compelling class-wide arbitration is a non-appealable order "directing arbitration to proceed." *Id.* at 20-22 (citing 9 U.S.C. § 16(b)(2)).

But that argument is a red herring. As Varela acknowledges (Opp. 23), the district court's order *also dismissed* his claims. Pet. App. 23a. That dismissal rendered the order final. As this Court held in *Randolph*, when a district court orders arbitration and dismisses the plaintiff's claims, the order is "'a

final decision with respect to an arbitration' within the meaning of § 16(a)(3), and an appeal may be taken." 531 U.S. at 86-87 (quoting 9 U.S.C. § 16(a)(3)).

Varela tries and fails to distinguish *Randolph* in two ways. He first notes that the dismissal here was "without prejudice," while the dismissal in *Randolph* was "with prejudice." Opp. 23. But he fails to explain how that could possibly make a difference. The dismissal here had the exact same effect as the dismissal with prejudice in *Randolph*: it "disposed of the entire case on the merits" and "left no part of it pending before the court." 531 U.S. at 86. This kind of dismissal is without prejudice "only in th[e] sense" that it does not "preclud[e] the parties from bringing a new action after completing arbitration," which "is not enough to show that the dismissal was interlocutory rather than an appealable final decision" under Section 16(a)(3). *Interactive Flight Techs., Inc.* v. *Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001) (citing *Randolph*).[2]

Second, Varela argues that the district court's dismissal "was not adverse to Lamps Plus." Opp. 23. But the court's order also compelled a *class-wide* ar-

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[2] *Every* other circuit to reach the issue has similarly held that a dismissal without prejudice in favor of arbitration is a final, appealable order. See *Hill* v. *Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005); *Westlake Styrene Corp.* v. *P.M.I. Trading Ltd.*, 71 F. App'x 442, 442 (5th Cir. 2003); *Blair* v. *Scott Specialty Gases*, 283 F.3d 595, 601-02 (3d Cir. 2002); *Salim Oleochemicals* v. *M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002), abrogated on other grounds by *Katz* v. *Cellco P'Ship*, 794 F.3d 341 (2d Cir. 2015).

bitration that Lamps Plus never sought—and actively argued *against*. See Pet. 7.[3]

Even if there had been no dismissal, Lamps Plus was entitled to appeal because the district court's order effectively *denied* Lamps Plus's motion to compel arbitration. Lamps Plus asked for "an order directing that * * * arbitration proceed *in the manner provided for in such agreement*"—i.e., on an individual basis. 9 U.S.C. § 4 (emphasis added); ER 144. That the district court purported to grant Lamps Plus's motion is not controlling: in matters of appellate jurisdiction, this Court is "concerned, not with form, but with substance." *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 259 (1933).

Varela contends that Lamps Plus received an "order granting relief it requested," and "succeeded in convincing a district court to give it *more* relief than it needed" (Opp. 23-24), and complained only because the arbitration ordered was "not in the procedural manner preferred by" Lamps Plus (*id.* at 22). But this Court in *Stolt-Nielsen rejected* the proposition that class-wide arbitration involves "merely what 'procedural mode' is available to present [a party's] claims." 559 U.S. at 687. It held that "class arbitration" is "not arbitration as envisioned by the FAA" and "lacks its benefits." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350-51 (2011). And "the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'funda-

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[3] Varela never asked the district court for an order compelling class arbitration. Rather, recognizing that Lamps Plus's motion sought to compel arbitration on an individual basis, Varela asked the district court to *deny* the motion. *E.g.*, ER 111-112, 122, 135.

mental.'" *Id.* at 348 (quoting *Stolt-Nielsen*, 559 U.S. at 686).[4] The district court's order in this case imposed these "fundamental" changes on Lamps Plus over its objections; Lamps Plus was entitled to appeal that adverse decision.

II. The Decision Below Defies This Court's Precedents Interpreting The FAA.

1. Varela offers only a cursory defense of the merits of the decision below. He first insists that no federal question is presented here because the panel purported to discover an intent to authorize class-wide arbitration based on California contract law. Opp. 7-11.

That argument ignores *Stolt-Nielsen*, which explained that "[w]hile the interpretation of an arbitration agreement is *generally* a matter of state law, the *FAA* imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" 559 U.S. at 681 (citations omitted; emphasis added). Accordingly, the

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[4] Not one of the cases Varela cites (Opp. 21-22) involved an order imposing class arbitration on a defendant over its objection; most involved different locations or forums for an individual arbitration. *Al Rushaid* v. *Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 304 (5th Cir. 2016) (no jurisdiction over order compelling arbitration within the Southern District of Texas rather than before the International Chamber of Commerce); *Blue Cross Blue Shield of Mass., Inc.* v. *BCS Ins. Co.*, 671 F.3d 635, 637-38 (7th Cir. 2011) (order refusing to deconsolidate a pending arbitration); *Bushley* v. *Credit Suisse First Boston*, 360 F.3d 1149, 1154 (9th Cir. 2004) (order compelling arbitration under company dispute resolution program rather than before the National Association of Securities Dealers); *Augustea Impb Et Salvataggi* v. *Mitsubishi Corp.*, 126 F.3d 95, 98 (2d Cir. 1997) (order compelling arbitration in New York rather than London).

"*FAA* requires more" (*id.* at 687 (emphasis added)) to infer an agreement to authorize class arbitration beyond "the fact of the parties' agreement to arbitrate" (*id.* at 685) incorporating language found in most any arbitration agreement.

Varela concedes that the FAA displaces an interpretation of state law that "impose[s] class arbitration for policy reasons rather than on the basis of contract-law principles that 'give effect to the contractual rights and expectations of the parties.'" Opp. 8 (quoting *Stolt-Nielsen*, 559 U.S. at 682). That is exactly what the panel below did here. See Pet. 13-19.

Moreover, this Court granted review in both *Kindred* and *Imburgia* over similar contentions that the lower court rulings rested on state-law grounds. See Br. in Opp. 14-18, 34, *Kindred* (No. 16-32), 2016 WL 4710183; Br. in Opp. 3, *Imburgia* (No. 14-462), 2015 WL 455815. *Imburgia* squarely rejected the state court's protestations of neutrality in interpreting the phrase "law of your state" in a consumer contract. This Court held that although "California courts are the ultimate authority on [California] law," it was for this Court to decide whether "that state law is consistent with the Federal Arbitration Act." *Imburgia*, 136 S. Ct. at 468.

2. Varela's half-hearted defense of the Ninth Circuit's interpretation of the Agreement underscores the lower court's error.

The petition explains (at 13-19) why the panel majority (Judges Reinhardt and Wardlaw) erred in declaring that there was "ambiguity" as to whether the parties agreed to class arbitration based on the following language:

- the waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company";
- the waiver of "any right I may have to resolve employment disputes through trial by judge or jury"; and
- the agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

Pet. App. 3a. Varela appears to give up on the first two phrases, acknowledging that "waiver of a right to a jury" and of the right to go to court are "inherent in all arbitration agreements." Opp. 12; see also *Kindred*, 137 S. Ct. at 1427 (describing "a waiver of the right to go to court and receive a jury trial" as "the primary characteristic of an arbitration agreement"). Varela also has no response to our showing that class procedures are not a substantive "claim" or a "remedy," and thus an agreement to use class procedures cannot be inferred from the Agreement's authorization of arbitration for "claims" that "would have been available to the parties by law" or for the arbitrator to award "any remedy allowed by applicable law." Pet. 15-16.

As to the Agreement's statement that arbitration is "in lieu" of "civil legal proceedings," Varela accuses us of confusing the word "proceedings" with "procedures." Opp. 12 & n.2. But he is describing the Ninth Circuit's error, not ours. The "in lieu of" language simply means that arbitration replaces litigation in court (Pet. 14 & n.4); it was the Ninth Circuit that read the phrase to mean that the arbitration must

duplicate all procedures available in court, such as the class device.[5]

Varela argues that the Ninth Circuit could have inferred ambiguity about whether the parties agreed to class arbitration from the Agreement's "unique *combination* of provisions." Opp. 12. But not one of the provisions in the Agreement even remotely supports an inference that the parties agreed to authorize class arbitration. Zero plus zero equals zero, not one. And Varela ignores multiple provisions of the Agreement demonstrating the parties' intent to engage in traditional, bilateral arbitration. Pet. 14-16 & nn.5-6.

Finally, Varela's reliance on *Oxford Health Plans* (Opp. 13-14) is misguided: the arbitrator's construction of the contract stood *only* because of the limited judicial review available under Section 10 of the FAA. See Pet. 28.

For all of these reasons, Varela's attempt to defend the panel majority's resort to the state-law principle that ambiguities are construed against the drafter (Opp. 15-17) never gets off the ground: "the Agreement was not ambiguous." Pet. App. 5a (Fernandez, J., dissenting). And Varela's suggestion that Lamps Plus's disagreement with the majority's interpretation of the Agreement *itself* creates an ambiguity (Opp. 12) contradicts clear California law: "An agreement is not ambiguous merely because the parties (or judges) disagree about its meaning." *Abers* v.

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[5] Varela also points to the Agreement's provisions addressing discovery and other procedural matters (Opp. 12 n.2), but fails to address our showing that the Agreement's limits on discovery (such as one deposition per side) further demonstrates that the parties contemplated *bilateral* arbitration. Pet. 15 n.5.

Rounsavell, 189 Cal.App.4th 348, 356 (2010); accord *Pac. Gas & Elec. Co.* v. *FERC*, 746 F.2d 1383, 1387 (9th Cir. 1984).

In any event, the FAA forecloses the panel majority's reliance on a state-law canon to manufacture consent to class arbitration. Pet. 18-19. Varela points to this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (cited at Opp. 15-16), but *Mastrobuono* did not hold, or even suggest, that the *Federal* Arbitration Act takes a backseat to any *state*-law maxim. *Mastrobuono* decided the question presented—whether the contract at issue authorized arbitration of punitive-damages claims—by applying the strong federal policy *favoring* arbitration. The Court first drew the pro-arbitration conclusion that punitive-damages claims are arbitrable absent a clear statement of the parties' contrary intent, which the parties had not made. 514 U.S. at 57-62. The Court then explained that (in the context of that case) construing the language of the arbitration provision against the drafter lent *further support* to the conclusion that the dispute was subject to arbitration. *Id.* at 62-63. Thus, the Court did not hint that a state-law tenet could trump the FAA when the two point in *opposite* directions.

III. The Decision Below Conflicts With The Decisions Of Several Other Circuits.

Varela fares no better in attempting to paper over the conflict between the decision below and decisions from other courts. Opp. 17-19.

He argues that each involved "terms materially different from those of the contract at issue here" (Opp. 17), but identifies no differences that are actually material. He relies heavily on this Agreement's

statement that arbitration shall be in lieu of "civil legal proceedings" (*id.* at 17-18), but as explained above, that statement does not hint at an agreement to authorize class arbitration.

Varela also asserts that the Fifth Circuit's "reasoning" in *Reed* v. *Florida Metropolitan University, Inc.*, 681 F.3d 630 (5th Cir. 2012) was abrogated by *Oxford Health Plans*. Opp. 18-19. But as the petition explains, while the Fifth Circuit was not permitted to override an *arbitrator's* interpretation of the contract under Section 10 of the FAA, the Fifth Circuit's explanation of the flaws in the arbitrator's interpretation continues to have persuasive force in the context of a *de novo* review of a *court's* contract interpretation. Pet. 21-22 & n.7.

Finally, Varela mischaracterizes the square conflict presented here as merely reflecting the application of different states' contract laws. Opp. 19. It is "the *FAA*"—not state law—that "requires more" to infer an agreement to authorize class procedures than "the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685, 687 (emphasis added); see also pages 5-6, *supra*. The Ninth Circuit's defiance of that federal principle creates a conflict with other courts of appeals on the question of FAA preemption presented by the petition.

IV. Varela's Other Asserted Obstacles To Review Are Baseless.

Varela raises a handful of other arguments, but none undermines the need for or appropriateness of this Court's review.

First, Varela repeatedly notes that the decision below is unpublished. Opp. 1, 6, 18. But the panel majority should not be able to insulate its "palpable

evasion" of this Court's precedents (Pet. App. 5a) by passing it off as a routine application of settled precedent—especially over a strong dissent. "Nonpublication must not be a convenient means to prevent review." *Smith* v. *United States*, 112 S. Ct. 667 (1991) (Blackmun, J., dissenting from denial of certiorari); see also *Plumley* v. *Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari); Chamber of Commerce Br. 12 n.3.

Second, Varela notes that the decision below does not resolve the merits of the underlying dispute. Opp. 24-25. But that decision is the final word on the question presented—whether the Agreement authorizes class arbitration. This Court routinely decides cases involving the FAA before the resolution of the parties' underlying dispute. See, *e.g.*, *Kindred*, 137 S. Ct. 1421; *Imburgia*, 136 S. Ct. 463; *Am. Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228 (2013); *Concepcion*, 563 U.S. 333.

Third, Varela states that it is an open question whether the availability of class arbitration "is properly a question for a court or an arbitrator." Opp. 25-26. But the parties agreed to have a court decide that issue, so that question is irrelevant here.

Fourth, Varela points to the consolidated cases pending before this Court involving class-action waivers in the employment context, and argues that reversal here is contingent on the outcome of those cases. Opp. 26-27. But that was not the basis for the Ninth Circuit's decision. In any event, those cases will be decided this Term, perhaps before consideration of the petition. Holding this petition until those cases are resolved presents no difficulty.

Finally, Varela speculates, without empirical support, that the question presented is becoming less important since this Court's decisions in *Concepcion* and *American Express*. But at least a dozen circuit and district court cases decided since *American Express* and *Concepcion* present the issue whether an arbitration agreement authorizes class arbitration under *Stolt-Nielsen*. Pet. 19-23 & n.8. In addition, the American Arbitration Association's class arbitration docket reveals over 40 Clause Construction Awards—i.e., decisions by arbitrators assessing whether an arbitration clause authorizes class arbitration—since 2013. The issue presented has not vanished. Instead, the Ninth Circuit's defiance of this Court's precedents warrants this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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